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No. 564

IN THE

Supreme Court of the United States

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO JURISDICTIONAL STATEMENT

THEODORE R. SAKER,
50 E. Broad St., Columbus, Ohio,
AVETIS G. DARVANAN,
802 Mahoning Bank Building, Youngstown, Ohio,
Attorneys for Appellant,

CLYDE OSBORNE,
Prosecuting Attorney,
Mahoning County Court House, Youngstown, Ohio,
Attorney for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

October Term, 1964

No. .....

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Supreme Court of the State of Ohio denying an application for rehearing entered on April 29, 1964, to appeal from the decision of the Court of Appeals of Ohio, Seventh Judicial District, upholding the conviction of the appellant, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The decisions of the Supreme Court of the State of Ohio dismissing appellant's appeal on the grounds that no substantial constitutional question was involved; sustaining appellee's motion to dismiss the appeal as of right; dismissing appellant's motion for leave to appeal; and denyings a rehearing application of appellant's case are printed

in Appendix "A" hereto, *infra*, pages VII to X. The decisions of the Court of Appeals of Ohio, Seventh Judicial District, is printed in Appendix A hereto, *infra*, pages I to VI. Copies of the record in the original court, the Court of Common Pleas of Mahoning County are a part of the record in this case.

JURISDICTION

This suit was brought under Section 2953.02 Ohio Revised Code to reverse the decision of the Common Pleas Court of Mahoning County. The judgment of the Court of Appeals of Ohio was entered on October 23, 1963. The judgment of the Supreme Court of the State of Ohio was entered on March 25, 1964. The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Ker v. State of California*, 374 U.S. 23; *Norris v. State of Alabama*, 294 U.S. 587; *Pierre v. Louisiana*, 306 U.S. 354.

QUESTION PRESENTED

Whether the "probable cause" prohibition of the Fourth Amendment to the Constitution of the United States, and the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, have been violated by the officials of the State of Ohio because of the failure of the trial court to exclude the evidence taken under the authority of a search warrant deficient in the following particulars:

1. The search warrant was issued on the affidavit of an officer who recited merely his "suspicion" thereupon that illegal activities were taking place on the premises.

2. The specific time of the observation upon which the affidavit was based and upon which the warrant was issued was not noted on the affidavit.
3. The arresting officer failed to file the affidavit upon which the warrant in question was issued with the judge granting the warrant.

STATEMENT

A paper, purporting to be a search warrant was issued by the Common Pleas Court of Mahoning County to Officer Andrew Kovac of the Youngstown, Ohio, Police Department on August 2, 1962. Under the authority of this purported warrant three police officers entered the appellant's tavern, served appellant with the warrant, searched appellant, and found slips of paper in his pocket. Appellant's tavern was then searched and appellant was taken by the police officers to the police headquarters for questioning.

On March 15, 1963, Appellant moved that the evidence collected from the appellant be excluded from entrance at his trial because the search warrant was issued on an affidavit which recited that the applicant officer "suspected" that illegal actions were transpiring at the appellant's premises; that while appellant was being searched, no record of the issuance of the search warrant was on file with the issuing court; and that the specific time of observation of these "suspected" activities was not stated in the search warrant.

The court overruled this motion and the appellant was tried before a jury on March 18, 1963, before a jury which returned a verdict of "Guilty, as charged in the indictment." Appellant's Motion for a New Trial and Application for Probation were overruled, and the appellant was sentenced to a term of not less than one and not more than ten years in the Ohio Penitentiary.

A notice of appeal was perfected to the Ohio Court of Appeals, Seventh Judicial District, at which time, *inter alia*,

the appellant appealed upon grounds that the trial court erred in overruling appellant's motion to suppress evidence. After reciting that appellant questioned this action of the trial court, the Court of Appeals stated that:

> "*Mapp* specifically states that it is for the trial court in the first instance to determine what constitutes a reasonable search and seizure and that in so doing the trial court may not follow any fixed formula." Appendix A., *infra*, p. V.

Subsequent to the Court of Appeals' decision to uphold the trial court, the appellant appealed to the Supreme Court of the State of Ohio on the grounds that the trial court had erred in overruling the motion to suppress evidence and that the Court of Appeals had erred in sustaining the judgment of the trial Court. The Ohio Supreme Court dismissed all of the appellant's motions to this end and appellant perfected appeal to this Court by filing a Notice of Appeal with the Supreme Court of the State of Ohio.

THE QUESTION IS SUBSTANTIAL

The appellant herein would have this court consider, once again, the validity of a search warrant found to be valid by the courts of the State of Ohio. Appellant believes that the warrant involved and the affidavit upon which the warrant was issued is faulty and that the courts of Ohio were grossly mistaken in not ordering the evidence seized under this warrant excluded at the appellant's trial.

1. The warrant in question was issued on the mere suspicion that illegal activities were taking place, according to the affidavit of officer Kovac, who said that the premises had been observed and people were seen who were "suspected of playing the numbers game." See Affidavit for Search Warrant, Appendix B.

This Court has decided that the mere belief or suspicion of the affiant is not a sufficient basis for the issuance of a warrant. *Nathanson v. United States*, 282

U.S. 344. Since it is a ruling of this Court that a warrant issued on a faulty affidavit violates the Federal Constitution and since this Court decided in *Kerle v. California* 374 U.S. 23; and *Mapp v. Ohio*, 367 U.S. 643; that the state law enforcement officers must observe the rights of citizens regarding search and seizure guaranteed by the Constitution of the United States, a substantial question exists as to why these rights, guaranteed to the appellant in the light of these Supreme Court decisions, were not recognized by the agencies and courts of the State of Ohio.

2. The affidavit supporting the warrant in this case failed to set forth the time at which the affiant officer saw the suspicious persons except for the statement, "on two afternoons". See Appendix B.

The authorities are unanimous in holding that a specific statement in the affidavit for a search warrant of the time when the alleged offense was observed is essential for the validity of the search warrant based upon such an affidavit. Further, the statements as to the time of the alleged offense must be clear and definite and must not be too remote from the time of issuing the search warrant. 162 *ALR* 1406; *Rupenski v. United States*, 4 Fed. 2d, 17; *Poldo v. United States*, 55 Fed. 2d 866.

The opinions of this court have never directly treated the necessity of an exact statement of the time of observation in an affidavit supporting a search warrant; but it is appellant's contention that an exact statement is necessary. Therefore, a substantial question of a great general interest is raised by this appeal. That search warrants should issue on the basis of observations which *could* have been made years previous to the granting of a search warrant seems to be contrary to the essence of the safeguards provided by the Fourth Amendment.

3. Section 2933.23 of the Ohio Revised Code requires that no warrant shall issue until a copy thereof is filed with the judge who issues the warrant. See Appendix C. The arresting officer applied for and was granted the search warrant on August 2, 1962. The appellant's premises were searched on August 2, 1962. The record in the trial court shows (pages 19 through 27) that the affidavit was not filed, as required by statute, until August 3, 1962.

Appellant assigns as error this failure to file a copy of the warrant with the judge, because to permit the police officer to retain possession of both the affidavit and the search warrant throughout the course of the search and seizure, as is the case here, gives the police officer the opportunity to alter both documents to comply with the products of the search.

A search warrant is an extraordinary writ of the court which issues that warrant, and a reading of the Fourth Amendment shows that the courts, not the police officers, are to control that search. To provide an opportunity for changing that writ without the authority of the court, is to deny the appellant's constitutional right to be secure against an illegal search and seizure.

It is submitted that the decisions of the courts of Ohio in this case fail to give support to the United States Supreme Court dictates regarding the legality of search warrants. The appellant therefore believes that the questions presented by the appeal are substantial and that they are of public importance.

THEODORE R. SAKER,
50 E. Broad St., Columbus, Ohio,
AVETIS G. DARVANAN
Counsel for Appellant
802 Mahoning Bank Building, Youngstown, Ohio

APPENDIX A

IN THE COURT OF APPEALS SEVENTH JUDICIAL DISTRICT

Case No. 4324

STATE OF OHIO,
COUNTY OF MAHONING, } ss.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARMEN TISONE,
Defendant-Appellant.

JOURNAL ENTRY

(Filed October 23, 1963)

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript, and the original papers and pleadings from the Court of Common Pleas of Mahoning County, Ohio, and was argued by counsel, the Court examined all of the claims of error, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the Appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed.

It is further ordered that a special mandate be sent to the Common Pleas Court of Mahoning County, Ohio, directing the Court of Common Pleas to carry this judgment

into execution. To all of which, Appellant, by his counsel excepts.

APPROVED:

/s/ LOREN E. VAN BROCKLIN,
Attorney for Plaintiff-Appellee

/s/ AVETIS G. DARVANAN,
Attorney for Defendant-Appellant

/s/ PAUL W. BROWN,
Judge.

/s/ JAMES G. FRANCE,
Judge.

/s/ GEORGE M. JONES,
Judge.

IN THE COURT OF APPEALS SEVENTH JUDICIAL DISTRICT

Case No. 4324

STATE OF OHIO
COUNTY OF MAHONING } ss:

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARMEN TISONE,
Defendant-Appellant.

JOURNAL ENTRY

This cause came on for hearing upon the motion for rehearing and the brief in support thereof filed by Defendant-Appellant. Upon consideration whereof the Court finds that the motion is not well taken and is hereby overruled.

/s/ PAUL W. BROWN,
Judge

/s/ JAMES G. FRANCE,
Judge

/s/ GEORGE M. JONES,
Judge

APPROVED:

/s/ LOREN E. VAN BROCKLIN,
Attorney for Plaintiff-Appellee.

/s/ AVETIS G. DARVANAN,
Attorney for Defendant-Appellant.

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS, SEVENTH DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARMEN TISONE,
Defendant-Appellant.

OPINION

Case No. 4324

APPEARANCES

Clyde W. Osborne, Prosecuting Attorney, and Loren E. Van Brocklin, Assistant Prosecuting Attorney, Youngstown, Ohio, for Plaintiff-Appellee.

Avetis G. Darvanan, Youngstown, Ohio, for Defendant-Appellant.

Hon. Paul W. Brown, Hon. James G. France, Hon. George M. Jones, JJ.

Dated: October 22, 1963.

Grace Marten, Court of Appeals Reporter, Mahoning County Courthouse, Youngstown, Ohio.

BROWN, P. J.

Defendant was found guilty by a jury and sentenced by the court for violating Revised Code Section 2915.13 (promoting a numbers game). Counsel for defendant maintains the court below must be reversed.

Defendant claims in his first assignment of error that Revised Code Section 2915.13 is unconstitutional in that it attempts to give the State of Ohio extra territorial police powers.

We hold that Revised Code Section 2915.13 does not violate any provision either of the Constitution of the State of Ohio or of the Constitution of the United States and that this assigned error is not well taken.

Defendant claims Revised Code Section 2915.13 is "unconstitutional because it is not definite and certain as to its meaning."

The act to which reference is here made is not uncertain in meaning. In fact, the words of the statute of which counsel for the defendant complains appear to have been inserted for the purpose of permitting particular words of local usage helpful in defining the exact "scheme of chance" to be inserted. The words or terms of similar import to "numbers game", "clearing house", or "policy" need only be such as will convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act. Wharton Criminal Law and Procedure (1957), Volume 1, Page 32, Section 18.

Defendant complains that the court erred in overruling appellant's motion to suppress evidence claimed to have been obtained by unlawful search and seizure. Defendant cites *Mapp v. Ohio*, 367 U. S. 643.

This case is authority for the point that admission in state court of evidence obtained by illegal search and seizure is a violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. *Mapp v. Ohio* overruled *Wolf v. Colorado*, 338 U. S. 25, which had held that the so-called exclusionary rule applied to federal courts only.

In determining what constitutes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution, the significance of the *Mapp* case must be confined strictly to the aggravated facts of that case.

Mapp specifically states that it is for the trial court in the first instance to determine what constitutes a reasonable search and seizure and that in so doing the trial court may not follow any fixed formula. See also *State v. Young*, 91 Ohio Law Abstract 21.

In this case a warrant was issued upon an affidavit regular in form which contained the allegations required by Revised Code Section 2933.23. The facts stated therein or elicited by the court before issuing the warrant were such as to justify the trial court in issuing a search warrant.

The affidavit filed with the court for the purpose of obtaining the warrant stated the place to be searched and the property to be seized. It recited the belief that gambling paraphernalia, to-wit, numbers slips and horse bet slips were in the possession of the defendant, Carmen Tisone, and that the belief was based upon the fact that said premises were kept under surveillance by affiant, a police officer, and was based upon his observations during that period of time. Among these facts were statements from which it could be gathered that the numbers of people who were frequenting the described premises during the period of observation, and the manner of their frequenting said establishment, was the basis of the belief of the affiant that there was probable cause for a warrant to issue.

In *State of Ohio v. Mapp*, 170 Ohio St. 427, the Supreme Court of Ohio assumed that the search and seizure was unlawful, so that court was not reversed by the United States Supreme Court upon this finding.

No federal case cited holds that state courts are required to follow rules or statutes followed by the federal courts in determining what is a reasonable and hence lawful search and seizure or the federal mechanics before obtaining a state court search warrant. If it were so held we would be extremely interested in the rationale.

The search in this case was reasonable and in all respects lawful, no right of privacy was unlawfully invaded. Due process was carefully observed. The police officers involved should be commended for diligence. The motion to suppress was properly overruled.

The fourth assigned error involves the trial court's refusal to instruct that mere possession of numbers slips by the defendant would not be a crime under Revised Code Section 2915.13. Under the evidence in the case such a charge was properly refused.

The record does not bear out the errors assigned as fifth and sixth, and they are overruled.

FRANCE, J., Concurs.

JONES, J., Concurs.

APPROVED:

PAUL W. BROWN,

Judge.

THE SUPREME COURT OF THE STATE OF OHIO

No. 38525

THE STATE OF OHIO, City of Columbus. } 1964 TERM

T it: Wednesday, March 25, 1964

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARMEN TISONE,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY

This cause, here on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the plaintiff-appellee recover from the defendant-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court. Journal 46, Page 319.

Witness my hand and the seal of the Court this 23rd day of September, 1964.

[SEAL]

THOMAS L. STARTZMAN,
Clerk.

By NORMAN P. MEYERS,
Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

No. 38525

THE STATE OF OHIO,
City of Columbus. } 1964 TERM

To wit: Wednesday, March 25, 1964

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARMEN TISONE,
Defendant-Appellant.

MOTION BY APPELLEE TO DISMISS APPEAL AS OF RIGHT

It is ordered by the Court that this motion is sustained.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 46, Page 317.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of September, 1964.

[SEAL]

THOMAS L. STARTZMAN,
Clerk.

By NORMAN P. MEYERS,
Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

No. 38525

THE STATE OF OHIO,
City of Columbus. } 1964 TERM

To wit: Wednesday, March 25, 1964

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARMEN TISONE,
Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Avetis G. Darvanan.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court. Journal 46, Page 317.

Witness my hand and the seal of the Court this 23rd day of September, 1964.

[SEAL]

THOMAS L. STARTZMAN,
Clerk.

By NORMAN P. MEYERS,
Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

No. 38525

THE STATE OF OHIO,
City of Columbus. } 1964 TERM

Wednesday, April 29, 1964

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CARMEN TISONE,
Defendant-Appellant.

REHEARING

It is ordered by the Court that rehearing in this case is denied.

It is further ordered that issuance of the mandate in this case be, and the same hereby is, stayed for a period of seven (7) days from this date to enable appellant to apply to the Supreme Court of the United States for a stay of execution.

/s/ KINGSLEY TAFT,
Kingsley Taft, *Chief Justice*

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 46, Page 375.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of September, 1964.

[SEAL]

THOMAS L. STARTZMAN,
Clerk.

By NORMAN P. MEYERS,
Deputy.

APPENDIX B

COPY

AFFIDAVIT FOR SEARCH WARRANT

Revised Code, Sec. 2933.23

The State of Ohio, *Mahoning* County.

Before me, *John W. Ford*, Judge of the Common Pleas Court in and for the above named County, personally came *Patrolman Andrew Kovac*, who being first duly sworn according to law, deposes and says:

That *he* believes, and has good cause to believe that the following articles, to-wit:

Gambling Paraphernalia, to wit:—
Numbers Slips and Horse Bet Slips

(1) *kept and used for unlawful gaming, etc.* are at the present time kept and concealed in said County of *Mahoning* and that the said articles, or some part thereof, are in the possession and under the control of *Carmen Tisone* at

(2) *1810 Wilson Ave., Youngstown, Ohio, a three (3) story brick building with glass front.*

And that said *Carmen Tisone* and the above named articles should be seized.

Such belief is based upon the fact that
said premises were kept under surveillance by the undersigned for two afternoons, and a large number of people were observed frequenting said establish-

---

(1) "Kept and used for the commission of crime," "kept and used for unlawful gaming, etc." "Stolen from," "embezzled from"

(2) Description of property in detail.

ment and suspected of playing the numbers game and placing horse bets.

/s/ ANDREW KOVAC

DEFENDANT'S EXHIBIT

No. .....

Sworn to and subscribed before me this *2nd* day of *August 1962*.

/s/ JOHN W. FORD,
Judge.

COPY

SEARCH WARRANT

Criminal Code—Chap. 9, Sec. 1 and 5

The State of Ohio, *Mahoning* County.

TO THE CHIEF OF POLICE, YOUNGSTOWN, OHIO:

Whereas there has been filed with me an affidavit, of which the following is a true copy, to-wit:
The State of Ohio, *Mahoning* County.

Before me *John W. Ford*, Judge of the Common Pleas Court in and for the above named County, personally came *Patrolman Andrew Kovac*, who being first duly sworn according to law, deposes and says:

That he believes, and has good cause to believe that the following articles, to-wit:

Gambling Paraphernalia, to wit:—
Numbers Slips and Horse Bet Slips

are at the present time kept concealed in said County of *Mahoning* and that the said articles, or some part thereof, are in the possession and under the control of *Carmen Tisone* at *1810 Wilson Ave., Youngstown, Ohio, a three (3) story brick building with glass front.*

And that said *Carmen Tisone* and the above named articles should be seized.

Such belief is based upon the fact that

said premises were kept under surveillance by the undersigned for two afternoons, and a large number of people were observed frequenting said establish-

ment and suspected of playing the numbers game and placing horse bets.

/s/ ANDREW KOVAC

DEFENDANT'S
EXHIBIT
No. .....

Sworn to and subscribed before me this *2nd* day of *August 1962.*

/s/ JOHN W. FORD,
Judge.

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the *daytime*, into 1810 Wilson Ave., Youngstown, Ohio, a three (3) story brick building with a glass front of the said *City* of *Youngstown* in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to-wit:

Gambling Paraphernalia, to wit:—
Numbers Slips and Horse Bet Slips

and that you bring the same or any part thereof, found on such search, and also the body of *Carmen Tisone* forthwith before me, or some other Judge or Magistrate of the County having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand, this *2nd* day of *August 1962.*

/s/ JOHN W. FORD,
Judge.

RETURN OF CHIEF OF POLICE, YOUNGSTOWN, OHIO

The State of Ohio, ... County.

Received this writ *August 2, 1962*, at *10:00* o'clock A.M., and *entered 1810 Wilson Ave. at 2:30 P.M. date, and confiscated off of the person of Carmen Tisone, 25 slips with numbers on them, 7 white slips with horse bets on same, 2 white slips with horse bets and numbers on same, 2 white pads.*

FEES

Service & Return $.....
(Each person named $1.00)
Mileage, - - - - - - .....
Assistants, - - - - - .....
Total, - - - - - - $.....

s/ ANDREW KOVAC
s/ THOMAS E. DEWITT
.....
Sheriff
By.....
Deputy

APPENDIX C

Ohio Revised Code Section 2933.23

"A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing the warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 564.

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

MOTION AND BRIEF TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO.

CLYDE W. OSBORNE,
Prosecuting Attorney,
Mahoning County Court House,
Market Street,
Youngstown, Ohio,

LOREN E. VAN BROCKLIN,
Assistant Prosecuting Attorney,
Mahoning County Court House,
Market Street,
Youngstown, Ohio,
Attorneys for Appellee.

THEODORE R. SAKER,
50 E. Broad Street,
Columbus, Ohio,

AVETIS G. DARVANAN,
802 Mahoning Bank Building,
Youngstown, Ohio,
Attorneys for Appellant.

THE GILBERT LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 564.

CARMEN TISONE,
Appellant,

vs.

THE STATE OF OHIO,
Appellee.

MOTION AND BRIEF TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO.

QUESTION PRESENTED.

Whether the Trial Court violated the constitutional rights of the Appellant as protected by the IV and XIV Amendments of the Constitution of the United States by failing to sustain a motion to suppress certain evidence which had been obtained as a result of a legally sufficient search warrant.

STATUTES INVOLVED.

Ohio Revised Code Section 2915.13, see Appendix C, page 20; Ohio Revised Code Section 2933.23, see Appendix C, page 20; Ohio Revised Code Section 2933.24, see Appendix C, page 20.

STATEMENT.

Appellant, Carmen Tisone, was indicted in Case No. 21773 by the Mahoning County, Ohio, Grand Jury for the Term of May, 1962. Appellant was charged with the violation of Ohio Revised Code Section 2915.13 (Promoting a Numbers Game).

The Appellant was arrested on August 2, 1962 by police officers of the City of Youngstown, Ohio, as a result of a search made at the Tisone Tavern, 1810 Wilson Avenue in the City of Youngstown, Ohio. The officers took this action pursuant to a search warrant issued by the Court of Common Pleas of Mahoning County, Ohio.

On March 18, 1963 this matter came on for trial before the Common Pleas Court and a Jury of twelve. Under date of March 19, 1963 the Jury returned a verdict of "Guilty as Charged." Prior to trial a motion was heard by the Trial Court relative to the suppression of the evidence obtained as a result of the search warrant. This motion was overruled by the Trial Court. The Trial Court sentenced the Appellant to a term of not less than one year nor more than ten years in the Ohio State Penitentiary. An appeal was perfected to the Court of Appeals, Seventh Judicial District. The Court of Appeals subsequently affirmed the verdict and judgment of the Court of Common Pleas. See Appendix A, page 13. The Supreme Court of Ohio upheld the conviction of the Appellant. See Appendix A, page 14.

ARGUMENT.

Appellant alleges that the Trial Court erred in overruling Appellant's motion to suppress the evidence obtained by virtue of a search warrant. Appellant has failed to establish any basis for this alleged claim of error on the part of the Trial Court. There is an allegation that the search warrant was not based upon a legally sufficient affidavit and, therefore, is in violation of the IV and XIV Amendments of the Constitution of the United States of America. The evidence in the case at bar not only fails to establish any illegal or unlawful proceedings by the Police Department in obtaining the search warrant but, on the contrary, clearly discloses that the police followed the statutory provisions of the State of Ohio in obtaining the search warrant in question.

See Appendix C, page 20, Ohio Revised Code Section 2933.23 and Ohio Revised Code Section 2933.24.

Clearly, Mr. Kovac (the affiant) was in possession of sufficient facts to cause him to believe that certain property that was described with particularity in the affidavit for the search warrant and the search warrant was concealed in the premises. The affiant had reason by virtue of the facts within his personal knowledge which would cause him to believe and form a belief sufficient to swear to the affidavit in question. The affidavit and the search warrant contained the following language:

> "* * * Such belief is based upon the facts that said premises were kept under surveillance by the undersigned for two afternoons, and a large number of people were observed frequenting said establishment and suspected of playing the numbers game and playing horse bets. * * *"

At the time the motion was heard relative to the suppression of evidence, Officer Kovac testified that the prem-

ises described as 1810 Wilson Avenue was kept under surveillance for two afternoons. Officer Kovac testified that the afternoons that he kept the premises under surveillance were August 1st and the 31st day of July, 1962. See Record, page 7, lines 23, 24, 25 and Record, page 8, lines 1 through 8. See Appendix D, pages 21 and 22.

> "Q. Now, officer, under this affidavit, you swore to it that you had observed these premises and kept them under surveillance for two afternoons. Now in relation to the date of August 2, 1962, when were these afternoons?
>
> A. Two days prior to the time we obtained the search warrant and affidavit.
>
> Q. That would be August 1 and the 31st day of July, 1962; am I correct?
>
> A. Yes, sir.
>
> Q. And what hours were those?
>
> A. Between 1:00 and 3:00 in the afternoon."

See also Record, page 8 where Officer Kovac continues to testify, lines 23, 24, 25 and Record, page 9, lines 1 through 25, and Record, page 10, lines 1 through 7. See Appendix D, pages 22-23.

Certainly, Mr. Kovac was in possession of sufficient facts within his own personal knowledge to cause him to form a belief that probable cause existed that Carmen Tisone was carrying on a gambling operation in the Tisone Tavern. The appellant places great reliance on the case of *Mapp vs. The State of Ohio*, 367 U. S. 643. This case is not in point. In the *Mapp* case it is doubtful that there was a search warrant. In the case at bar the officers were armed with a proper and legally sufficient search warrant. A reading of the Record will disclose this. Officer Andrew Kovac observed a large number of people entering the Tisone Tavern. He stopped a man who tore up a slip of paper and threw it on the wet pavement. Certainly he

had good reason to believe that gambling operations were being conducted on the premises known as Tisone's Tavern, 1810 Wilson Avenue, Youngstown, Ohio.

The State of Ohio is not here contesting *Mapp vs. Ohio*, 367 U. S. 643. The Supreme Court of Ohio in the recent case of *City of Akron vs. Williams*, 175 O. S. 186, held that the affidavit "must state the facts upon which such belief is based." In this case the affiant stated facts upon which his belief was based. The affidavit in the case at bar did not leave the determination whether there was probable cause for search to the judgment of the affiant.

Officer Andrew Kovac observed a large number of people entering the Tisone Tavern. He had kept the place under surveillance two days prior to obtaining the warrant. How can it be said that he did not have facts to form his belief? When this affidavit is examined it clearly will show that it is not subject to the disabilities the Court found in the case of *Nicholas vs. The City of Cleveland*, 125 O. S. 474. It is brought to this Court's attention that the affidavit for the search warrant in the case at bar meets the requirements of the law of Ohio as propounded by the Supreme Court of Ohio.

The State of Ohio, Appellee in this case, here and now state that they had a valid and subsisting search warrant. A review of the law of Ohio from *Nicholas vs. The City of Cleveland*, 125 O. S. 474 through *State vs. Lindway*, 131 O. S. 166 to *Mapp vs. Ohio*, 367 U. S. 643, and *City of Akron vs. Williams*, 175 O. S. 186, reveals that the affidavit and the search warrant in this case was legally sufficient. The affidavit and search warrant are based upon facts within the personal knowledge of the affiant and these facts are incorporated in the affidavit and the search warrant and are made a part of both instruments.

Defendant-Appellant alleges that the affidavit to obtain the search warrant was not filed prior to the issuing of the search warrant. This is simply not so. The affidavit to obtain the search warrant certainly was filed with the Court and Mr. Kovac did have a copy of the affidavit and the search warrant when he searched the premises in question. The affidavit and search warrant was filed with the Court of Common Pleas. In other words the Judge who issued the search warrant, in order that secrecy might be maintained, retained the affidavit and warrant in his files. If search warrants were not retained by the court when he issues the warrant and if they were filed in the Clerk's office prior to the search and spread upon the public record, this information would become general knowledge and the place to be searched would be tipped off by some enterprising citizen. See the testimony of William Machuga, Chief Deputy Clerk of Mahoning County, Ohio, Record, page 21, lines 21 through 25 and Record page 22, lines 1 through 15. See Appendix D.

See also Record page 26, lines 1 through 14. See Appendix D, pages 23-24.

Defendant-Appellant alleges that the affidavit to obtain the warrant was not filed in the Clerk's office until August 3, 1962, although the warrant was issued on August 2, 1962. There is no question but what there was no filing in the Clerk's office until August 3, 1962. The statutes of this state do not require that the affidavit to obtain a search warrant be filed in the Clerk's office prior to the issuance of the search warrant. Revised Code Section 2933.23 provides in part:

> "* * * a warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit. * * *"

There is no requirement that the affidavit be filed with the Clerk. The affidavit must be filed with the judge or the magistrate as the case may be—and this was done. It is submitted that this claim of error is not well taken.

Appellant cites the recent case of *Ker vs. California*, 374 U. S. 23, decided by the Supreme Court of the United States on June 10, 1963, as authority for the proposition that state courts must be guided by the federal court rules as to what constitutes probable cause. That case certainly does not hold that proposition whatsoever. *Ker vs. California* holds that the separate states:

> "are not precluded from developing workable rules governing arrest, search and seizures to meet the practical demands of effective criminal investigation and law enforcement in the states provided that those rules do not violate the constitutional proscription of unreasonable search and seizures and the concomitant command that evidence so seized against one who has standing to complain."
>
> "In the exercise of its supervisory authority over the administration of criminal justice in the Federal Courts, the Supreme Court has formulated rules of evidence to be applied in federal criminal prosecutions, but has established no assumption of supervisory authority over state courts. *Mapp vs. Ohio* implied no total obliteration of state laws relating to arrest and searches in favor of federal law."
>
> "There is no formula for the determination of reasonableness of a search, but each case must be decided on its own facts and circumstances."

Appellant relies on the case of *Go-Bart Importing Company, et al., vs. United States*, 282 U. S. 344. This case is not in point for the reason that reasonable grounds and probable cause do exist in the case at bar. United

States Supreme Court in the case of *Henry vs. United States,* 361 U. S. 98, 102; 4 L. Ed. (2d) 134, said:

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

A question of fact is presented in each case. The Youngstown police officer had good reason to believe that Tisone was regularly engaged in carrying on a scheme of chance involving policy tickets. See Record page 8 where Officer Kovac continues to testify, lines 23, 24, 25. Record page 9, lines 1 through 25; and Record page 10, lines 1 through 7, Appendix D, wherein the officer indicates that he had searched the premises in question on a prior occasion as a result of a prior search warrant. Mr. Kovac, the affiant, also indicated that on July 31st, 1962 he stopped a patron as he emerged from the tavern and the patron tore up a little slip and threw it on the ground.

CONCLUSION.

Appellee respectfully submits that the appeal should be dismissed on the grounds that it does not present a substantial Federal question for the reason stated. It is submitted that the judgment of the court below should be sustained.

CLYDE W. OSBORNE,
Prosecuting Attorney,
LOREN E. VAN BROCKLIN,
Assistant Prosecuting Attorney,
Court House, Mahoning County,
Youngstown, Ohio,
Counsel for the State of Ohio.

APPENDIX A.

OPINION OF THE COURT OF APPEALS FOR MAHONING COUNTY, OHIO.

(Dated: October 22, 1963.)

BROWN, P. J.

Defendant was found guilty by a jury and sentenced by the court for violating Revised Code Section 2915.13 (promoting a numbers game). Counsel for defendant maintains the court below must be reversed.

Defendant claims in his first assignment of error that Revised Code Section 2915.13 is unconstitutional in that it attempts to give the State of Ohio extra territorial police powers.

We hold that Revised Code Section 2915.13 does not violate any provision either of the Constitution of the State of Ohio or of the Constitution of the United States and that this assigned error is not well taken.

Defendant claims Revised Code Section 2915.13 is "unconstitutional because it is not definite and certain as to its meaning."

The act to which reference is here made is not uncertain in meaning. In fact, the words of the statute of which counsel for the defendant complains appear to have been inserted for the purpose of permitting particular words of local usage helpful in defining the exact "scheme of chance" to be inserted. The words or terms of similar import to "numbers game," "clearing house," or "policy" need only be such as will convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act. *Wharton Criminal Law and Procedure* (1957), Volume 1, page 32, Section 18.

Defendant complains that the court erred in overruling appellant's motion to suppress evidence claimed to

have been obtained by unlawful search and seizure. Defendant cites *Mapp v. Ohio,* 367 U. S. 643.

This case is authority for the point that admission in state court of evidence obtained by illegal search and seizure is a violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. *Mapp v. Ohio* overruled *Wolf v. Colorado,* 338 U. S. 25, which had held that the so-called exclusionary rule applied to federal courts only.

In determining what constitutes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution, the significance of the *Mapp* case must be confined strictly to the aggravated facts of that case.

Mapp specifically states that it is for the trial court in the first instance to determine what constitutes a reasonable search and seizure and that in so doing the trial court may not follow any fixed formula. See also *State v. Young,* 91 Ohio Law Abstract 21.

In this case a warrant was issued upon an affidavit regular in form which contained the allegations required by Revised Code Section 2933.23. The facts stated therein or elicited by the court before issuing the warrant were such as to justify the trial court in issuing a search warrant.

The affidavit filed with the court for the purpose of obtaining the warrant stated the place to be searched and the property to be seized. It recited the belief that gambling paraphernalia, to-wit, numbers slips and horse bet slips were in the possession of the defendant, Carmen Tisone, and that the belief was based upon the fact that said premises were kept under surveillance by affiant, a police officer, and was based upon his observations during that period of time. Among these facts were statements

from which it could be gathered that the numbers of people who were frequenting the described premises during the period of observation, and the manner of their frequenting said establishment, was the basis of the belief of the affiant that there was probable cause for a warrant to issue.

In *State of Ohio v. Mapp*, 170 Ohio St. 427, the Supreme Court of Ohio assumed that the search and seizure was unlawful, so that court was not reversed by the United States Court upon this finding.

No federal case cited holds that state courts are required to follow rules or statutes followed by the federal courts in determining what is a reasonable and hence lawful search and seizure or the federal mechanics before obtaining a state court search warrant. If it were so held we would be extremely interested in the rationale.

The search in this case was reasonable and in all respects lawful, no right of privacy was unlawfully invaded. Due process was carefully observed. The police officers involved should be commended for diligence. The motion to suppress was properly overruled.

The fourth assigned error involves the trial court's refusal to instruct that mere possession of numbers slips by the defendant would not be a crime under Revised Code Section 2915.13. Under the evidence in the case such a charge was properly refused.

The record does not bear out the errors assigned as fifth and sixth, and they are overruled.

Approved:

PAUL W. BROWN,
Judge.

FRANCE, J., Concurs.

JONES, J., Concurs.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Filed October 23, 1963.)

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript, and the original papers and pleadings from the Court of Common Pleas of Mahoning County, Ohio, and was argued by counsel, the Court examined all of the claims of error, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the Appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed.

It is further ordered that a special mandate be sent to the Common Pleas Court of Mahoning County, Ohio, directing the Court of Common Pleas to carry this judgment into execution. To all of which, Appellant, by his counsel, excepts.

JOURNAL ENTRY OF THE COURT OF APPEALS OVERRULING MOTION FOR REHEARING.

This cause came on for hearing upon the motion for rehearing and the brief in support thereof filed by Defendant-Appellant. Upon consideration whereof the Court finds that the motion is not well taken and is hereby overruled.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO.

(March 25, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the plaintiff-appellee recover from the defendant-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court. Journal 46, Page 319.

Witness my hand and the seal of the Court this 23rd day of September, 1964.

THOMAS L. STARTZMAN, *Clerk*,
By NORMAN P. MEYERS, *Deputy*.

(Seal)

ORDER OF THE SUPREME COURT OF OHIO SUSTAINING MOTION TO DISMISS.

MOTION BY APPELLEE TO DISMISS APPEAL AS OF RIGHT.

(March 25, 1964.)

It is ordered by the Court that this motion is sustained.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to-wit, from Journal No. 46, Page 317.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of September, 1964.

THOMAS L. STARTZMAN, *Clerk*.
By NORMAN P. MEYERS, *Deputy*.

(Seal)

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL.

(March 25, 1964.)

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY.

It is ordered by the Court that this motion is overruled.

Costs:

Motion Fee, $20,00, paid by Avetis G. Darvanan.

(Clerk's certificate omitted.)

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(April 29, 1964.)

It is ordered by the Court that rehearing in this case is denied.

It is further ordered that issuance of the mandate in this case be, and the same hereby is, stayed for a period of seven (7) days from this date to enable appellant to apply to the Supreme Court of the United States for a stay of execution.

/s/ KINGSLEY TAFT,

KINGSLEY TAFT, *Chief Justice.*

(Clerk's certificate omitted.)

APPENDIX B.

AFFIDAVIT FOR SEARCH WARRANT.

THE STATE OF OHIO, MAHONING COUNTY.

Before me, John W. Ford, Judge of the Common Pleas Court in and for the above named County, personally came Patrolman Andrew Kovac, who being first duly sworn according to law, deposes and says:

That he believes, and has good cause to believe that the following articles, to-wit:

Gambling Paraphernalia, to-wit:—
Numbers slips and Horse Bet Slips

(1) kept and used for unlawful gaming, etc. are at the present time kept and concealed in said County of Mahoning and that the said articles, or some part thereof, are in the possession and under the control of Carmen Tisone at (2) 1810 Wilson Ave., Youngstown, Ohio, a three (3) story brick building with glass front. And that said Carmen Tisone and the above named articles should be seized.

Such belief is based upon the fact that

said premises were kept under surveillance by the undersigned for two afternoons, and a large number of people were observed frequenting said establishment and suspected of playing the numbers game and placing horse bets.

/s/ ANDREW KOVAC.

Sworn to and subscribed before me this 2nd day of August, 1962.

/s/ JOHN W. FORD,
Judge.

SEARCH WARRANT.

THE STATE OF OHIO, MAHONING COUNTY.

To the Chief of Police, Youngstown, Ohio:

Whereas there has been filed with me an affidavit, of which the following is a true copy, to-wit:

The State of Ohio, Mahoning County.

Before me John W. Ford, Judge of the Common Pleas Court in and for the above named County, personally came Patrolman Andrew Kovac, who being first duly sworn according to law, deposes and says:

That he believes, and has good cause to believe that the following articles, to-wit:

Gambling Paraphernalia, to-wit:—
Numbers Slips and Horse Bet Slips

are at the present time kept and concealed in said County of Mahoning and that the said articles, or some part thereof, are in the possession and under the control of Carmen Tisone at 1810 Wilson Ave., Youngstown, Ohio, a three (3) story brick building with glass front, and that said Carmen Tisone and the above named articles should be seized.

Such belief is based upon the fact that

said premises were kept under surveillance by the undersigned for two afternoons, and a large number of people were observed frequenting said establishment and suspected of playing the numbers game and placing horse bets.

/s/ ANDREW KOVAC.

Sworn to and subscribed before me this 2nd day of August, 19 .

/s/ JOHN W. FORD,
Judge.

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the day time, into 1810 Wilson Avenue, Youngstown, Ohio, a three (3) story brick building with a glass front of the said City of Youngstown in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to-wit:

Gambling Paraphernalia, to-wit:—
Numbers Slips and Horse Bet Slips

and that you bring the same or any part thereof, found on such search, and also the body of Carmen Tisone, forthwith before me, or some other Judge or Magistrate of the County having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand, this 2nd day of August, 1962.

/s/ JOHN W. FORD,
Judge.

Return of Chief of Police. Youngstown, Ohio.

The State of Ohio, ... County.

Received this writ August 2, 1962, at 10:00 o'clock A. M., and entered 1810 Wilson Ave. at 2:30 P. M. date, and confiscated off of the person of Carmen Tisone, 25 slips with numbers on them, 7 white slips with horse bets on same, 2 white slips with horse bets and numbers on same, 2 white pads.

/s/ ANDREW KOVAC,
/s/ THOMAS E. DEWITT.

APPENDIX C.

STATUTES.

OHIO REVISED CODE SECTION 2915.13—Promoting A "Numbers Game."

"No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years."

OHIO REVISED CODE SECTION 2933.23—Affidavit for Search Warrant.

"A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant."

OHIO REVISED CODE SECTION 2933.24—What Search Warrants Shall Contain.

"A warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the mate-

rial facts alleged in the affidavit, and particularly describe the things to be searched for, the house or place to be searched, and the person to be seized. Such warrant shall command the officer to search such house or place for the property or other things, and to bring them, together with the person to be seized, before the judge or magistrate. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night in which case a search in the night may be ordered. Such search warrant shall be returned by the officer holding the same not later than three days after issuance."

APPENDIX D.

EXCERPTS FROM THE RECORD.

Officer Kovac testified the afternoons that he kept the premises under surveillance were August 1st and July 31st, 1962. See Record page 7, lines 23, 24, 25 and Record page 8, lines 1 through 8.

> "Q. Now, officer, under this affidavit, you swore to it that you had observed these premises and kept them under surveillance for two afternoons. Now in relation to the date of August 2, 1962, when were these afternoons?
>
> A. Two days prior to the time we obtained the search warrant and affidavit.
>
> Q. That would be August 1 and the 31st day of July, 1962; am I correct?
>
> A. Yes, sir.
>
> Q. And what hours were those?
>
> A. Between 1:00 and 3:00 in the afternoon."

See also Record page 8 where Officer Kovac continues testify, lines 23, 24, 25 and Record page 9, lines 1 rough 25, and Record page 10, lines 1 through 7.

"Q. Did you stop anybody leaving this tavern at any time?

A. A couple of them we stopped.

Q. For what purpose?

A. We stopped them on South Center Street and asked them what they were doing in there. They said they went in to see a guy. I say: Who? They says: Carmen.

Q. Now, officer, you testified that you signed here and swore to it that a large number of people were observed frequenting said establishment and suspected of playing the numbers game and placing horse bets. Are you referring to July 31, 1962 and August 1, 1962?

A. And prior to that.

Q. Because we had another search warrant issued from the Municipal Court.

Q. How long was that?

A. About two, three months before that.

Q. And is that the one Judge Joyce gave you?

A. I think it is.

Q. Did you search this place pursuant to the warrant Judge Joyce gave you?

A. We did.

Q. Did you find anything?

A. Not at that time.

Q. Now, on July 31, 1962, outside of observing a large number of men going into this tavern, did you observe anything connected with the numbers business that day, those two days?

A. Those two days prior when we stopped those fellows that came out of there and stopped them on South Center Street?

Q. Yes.

A. We asked them—one of them had tore up a little slip and threw it on the floor just before we stopped him.

Q. What did the other one do?

A. The other one we stopped, he said he went in to see Carmen."

See the testimony of William Machuga, Chief Deputy Clerk of Mahoning County, Ohio, Record page 21, lines 21 through 25 and Record page 22, lines 1 through 15:

"A. They don't appear in the Court's half sheet. Entries of the issuance of the search warrant do not appear on the Court's half sheet.

Q. Are there any other cases in your office under which search warrants are issued where the entries are kept?

A. No; the only—well, apparently in connection with these there are no entries made. That is journal entries.

Q. What do you mean with these, search warrants?

A. The first time these come to our attention is when they are brought in to our office already executed, and at which time they are posted on the appearance docket.

Q. The Court makes no entry on any affidavit or search warrant as to date of filing in its half sheet?

A. Ordinarily I would say not. I don't recall of any where it's been done.

Q. When is the first time you receive these affidavits and search warrants?

A. Well, when they—either I suppose the officer executing it or the prosecutor's office would bring them down to us.

Q. After they have been served or returned?"

See also Record page 26, lines 1 through 14.

Mr. Darvanan: "That is all."

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CROSS EXAMINATION by Mr. Van Brocklin.

"Q. Mr. Machuga, you are the Chief Deputy Clerk of Courts, aren't you?

A. Yes, sir.

Q. And in the course of your official capacity you have had occasions to see officers and members of the prosecutor's staff come in with affidavits for search warrants and search warrants that have been signed by judges and the seal put on the respective papers and not left in your office; is that correct?

A. I think on occasions I have seen that done."

Office Supreme Court, U.S.
FILED
JAN 8 1965
JOHN F. DAVIS, CLERK

No. 564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

REPLY TO MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO

THEODORE R. SAKER,
50 E. Broad St., Columbus, Ohio,
AVETIS G. DARVANAN,
802 Mahoning Bk. Bldg., Youngstown, Ohio,
Attorneys for Appellant.

CLYDE OSBORNE,
Prosecuting Attorney,
Mahoning County Court House,
Youngstown, Ohio,
Attorney for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 564

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

REPLY TO MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO

The appellant appeals from the judgment of the Supreme Court of the State of Ohio denying an application for rehearing of the Court of Appeals of Ohio, Seventh Judicial District, upholding the conviction of the appellant, and submits this Reply to Appellee's Motion to Dismiss the Appeal in order to further demonstrate to the Supreme Court of the United States that substantial questions of process and procedure are presented by this appeal, and to show that the grounds for dismissal cited by the Appellee are not well taken and should not be accepted by this Court.

QUESTION PRESENTED

Broadly, the question presented by this appeal is whether the court which originally tried the Appellant violated the Appellant's Constitutional rights guaranteed by the IV

and XIV Amendments to the Constitution of the United States by failing to sustain the Appellant's Motion to Suppress Evidence which had been obtained through the use of an alleged warrant for search.

In addition to this general question, the Appellant is asking the Court to consider several novel and substantial questions, which, if answered, will do much to illustrate the demands of the "due process" and "probable cause" prohibitions of the Constitution of the United States.

First, the Court is being asked to decide a fundamental question regarding the technical definition of the probable cause which will justify the issuance of a warrant. Article I, Section 14 of the Constitution of the State of Ohio and IV of the Amendments to the Constitution of the United States require that "probable cause" be shown before a warrant will issue. *Ex Parte Burford*, 3 Cranch 448, 453; *Rice v. Ames*, 180 U.S. 371, 374; *Byars v. United States*, 273 U.S. 28; *United States v. Hess*, 124 U.S. 483; and *Go-Bart Importing Co., et al., v. United States* 282 U.S. 344, 355, stand for the proposition that the issuance of a warrant must recite *facts* which are sufficient to demonstrate that an offense has been committed or that evidence of an offense may be found in the location set forth in the warrant. Ohio Revised Code, Section 2933.23; *Nicholas v. City of Cleveland*, 125 O.S. 474 (See Syllabus paragraph 4.); and *City of Akron, v. Williams*, 175 O.S. 186 (See Syllabus paragraph 1), demand that the officer to whom a warrant is issued recite *facts* which are likewise, sufficient to show that the affiant's belief correct. In the instant case, the officer to whom the warrant was issued stated only one *fact*—that he had kept the suspect premises under surveillance for two afternoons. He then went on to recite his *suspicion* that illegal activities were being perpetrated there.

The Appellee makes the somewhat novel contention that the facts known to the officer but which were not transcribed upon the affidavit were "incorporated in the affidavit and made a part of both instruments." See Appellee's Motion to Dismiss, pp. 4-5. Therefore, the Court is being asked to decide whether facts which, 1) were allegedly known to the officer, 2) may or may not have been recited to the judge issuing the warrant, and 3) were definitely not transcribed upon the affidavit are acceptable, according to Constitutional standards, for demonstration of "probable cause." It is Appellant's contention that these secondary "facts" claimed as justification by the Appellee are the same as the "after-the-event justification" so "likely to be subtly influenced by the familiar shortcomings of hindsight judgment" which was found insufficient to establish probable cause in *Beck v. State of Ohio*, November 23, 1964, reported originally in 33 LW 4015, 4017.

In the only opinion written in this case by the Ohio Courts it was stated that:

> "In determining what constitutes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution, the significance of the *Mapp* case must be confined strictly to the aggravated facts of that case." *State of Ohio v. Carmen Tisone*, Appendix B.

The Appellant contends that the Court of Appeals failed to realize the import of this Court's decision in *Mapp*. *Mapp v. Ohio*, 367 U.S. 643. To strictly confine the significance of a case which demands that the states uphold the exclusionary rule when "probable cause" has not been shown, therefore subverting the due process demand of the Fourteenth Amendment, to cases where the excesses of the police are physically brutal and the procedural violations most flagrant, is a denial of due process to the citizen whose rights are denied not so blatantly as were

those of Miss Mapp. The Ohio Court of Appeals goes on to say that:

> "*Mapp* specifically states that it is for the trial court in the first instance to determine what constitutes a reasonable search and seizure and that in so doing, the trial court may not follow any fixed formula." Appendix B.

Although *Mapp* does *not* make this contention, a slightly similar statement may be found in *Ker v. California*, 374 U.S. 23, 34. However, *Ker* does hold that evidence which is seized in avoidance of the proscription of illegal searches and seizures must be excluded at the trial.

Second, this Court is being asked to decide whether or not it is necessary that an exact statement of the time of observation of the allegedly criminal activity is necessary to make a warrant comply the safeguards provided by the Fourth Amendment.

Warrants for search and arrest are extraordinary writs of court, since their result will be an invasion of privacy under the authority of the court. It is Appellant's contention that extraordinary powers should be hedged about with at least ordinary precautions, one of which certainly is that police officers be precluded from obtaining search warrants on the basis of information which may have been made stale by the passage of time.

Third, the Appellee assumes that the affidavit supporting the search warrant was filed with the judge as required by Ohio Revised Code Section 2933.23. This assumption is totally incorrect. The testimony of Officer Kovac who obtained the search warrant and executed the warrant demonstrates conclusively that the executing officer had both the warrant *and the affidavit* in his possession from the time of signing before the judge until after the execution of the warrant.

* * * * * * * * * * *

"23 Q. And from 10:00 o'clock until 2:30 in the afternoon you had those, affidavit and search warrant, in your presence? 25 A. Yes, sir. (Transcript, page 12)

* * * * * * * * * * *

7 Q. Did you keep them with you after you served Mr. Tisone? 9 A. I think I brought them back the next morning.

10 Q. Overnight they were in your possession? 11 A. Yes, sir.

12 Q. Both the affidavit and search warrant? 13 A. Yes, sir. (Transcript, page 13)

Obviously, the judge who issued the warrant could rely only on his memory to protect the affidavit and warrant from any changes the executing officer may have wished to make in the matter set forth in those papers.

It has been Appellant's contention throughout that there is no magic in the mere issuance of a warrant. The permission to invade privacy must be based upon fact and must be safeguarded by reasonable steps to insure that if is executed within the extraordinary limits for which it is granted. The courts of Ohio seem loath to provide even the protection demanded by the statutes of the State of Ohio. The questions set forth here are not only substantial and of great public importance, but the rights guaranteed by the laws of the United States and the State of Ohio have been violated in the case of the Appellant.

THEODORE R. SAKER,
50 East Broad Street,
Columbus, Ohio,
AVETIS G. DARVANAN,
802 Mahoning Bank Bldg.,
Youngstown, Ohio,
Counsel for Appellant.

APPENDIX A

Ohio Revised Code Section 2933.23

"A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing the warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

APPENDIX B

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS, SEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

vs.

CARMEN TISONE,

Defendant-Appellant.

OPINION

Case No. 4324

APPEARANCES

Clyde W. Osborne, Prosecuting Attorney, and Loren E. Van Brocklin, Assistant Prosecuting Attorney, Youngstown, Ohio, for Plaintiff-Appellee.

Avetis G. Darvanan, Youngstown, Ohio, for Defendant-Appellant.

Hon. Paul W. Brown, Hon. James G. France, Hon. George M. Jones, JJ.

Dated: October 22, 1963.

Grace Marten, Court of Appeals Reporter, Mahoning County Courthouse, Youngstown, Ohio.

BROWN, P. J.

Defendant was found guilty by a jury and sentenced by the court for violating Revised Code Section 2915.13 (promoting a numbers game). Counsel for defendant maintains the court below must be reversed.

Defendant claims in his first assignment of error that Revised Code Section 2915.13 is unconstitutional in that it attempts to give the State of Ohio extra territorial police powers.

We hold that Revised Code Section 2915.13 does not violate any provision either of the Constitution of the State of Ohio or of the Constitution of the United States and that this assigned error is not well taken.

Defendant claims Revised Code Section 2915.13 is "unconstitutional because it is not definite and certain as to its meaning."

The act to which reference is here made is not uncertain in meaning. In fact, the words of the statute of which counsel for the defendant complains appear to have been inserted for the purpose of permitting particular words of local usage helpful in defining the exact "scheme of chance" to be inserted. The words or terms of similar import to "numbers game", "clearing house", or "policy" need only be such as will convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act. Wharton Criminal Law and Procedure (1957), Volume 1, Page 32, Section 18.

Defendant complains that the court erred in overruling appellant's motion to suppress evidence claimed to have been obtained by unlawful search and seizure. Defendant cites *Mapp v. Ohio*, 367 U. S. 643.

This case is authority for the point that admission in state court of evidence obtained by illegal search and seizure is a violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. *Mapp v. Ohio* overruled *Wolf v. Colorado*, 338 U. S. 25, which had held that the so-called exclusionary rule applied to federal courts only.

In determining what constitutes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution, the significance of the *Mapp* case must be confined strictly to the aggravated facts of that case.

Mapp specifically states that it is for the trial court in the first instance to determine what constitutes a reasonable search and seizure and that in so doing the trial court may not follow any fixed formula. See also *State v. Young*, 91 Ohio Law Abstract 21.

In this case a warrant was issued upon an affidavit regular in form which contained the allegations required by Revised Code Section 2933.23. The facts stated therein or elicited by the court before issuing the warrant were such as to justify the trial court in issuing a search warrant.

The affidavit filed with the court for the purpose of obtaining the warrant stated the place to be searched and the property to be seized. It recited the belief that gambling paraphernalia, to-wit, numbers slips and horse bet slips were in the possession of the defendant, Carmen Tisone, and that the belief was based upon the fact that said premises were kept under surveillance by affiant, a police officer, and was based upon his observation during that period of time. Among these facts were statements from which it could be gathered that the numbers of people who were frequenting the described premises during the period of observation, and the manner of their frequenting said establishment, was the basis of the belief of the affiant that there was probable cause for a warrant to issue.

In *State of Ohio v. Mapp*, 170 Ohio St. 427, the Supreme Court of Ohio assumed that the search and seizure was unlawful, so that court was not reversed by the United States Supreme Court upon this finding.

No federal case cited holds that state courts are required to follow rules or statutes followed by the federal courts in determining what is a reasonable and hence lawful search and seizure or the federal mechanics before obtaining a state court search warrant. If it were so held we would be extremely interested in the rationale.

The search in this case was reasonable and in all respects lawful, no right of privacy was unlawfully invaded. Due process was carefully observed. The police officers involved should be commended for diligence. The motion to suppress was properly overruled.

The fourth assigned error involves the trial court's refusal to instruct that mere possession of numbers slips by the defendant would not be a crime under Revised Code Section 2915.13. Under the evidence in the case such a charge was properly refused.

The record does not bear out the errors assigned as fifth and sixth, and they are overruled.

FRANCE, J., Concurs.

JONES, J., Concurs.

APPROVED:

PAUL W. BROWN,

Judge.

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

No. 564

IN THE

Supreme Court of the United States

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

PETITION FOR REHEARING

THEODORE R. SAKER,
50 E. Broad St., Columbus, Ohio,
AVETIS G. DARVANAN,
802 Mahoning Bk. Bldg., Youngstown, Ohio,
Attorneys for Appellant.

CLYDE OSBORNE,
Prosecuting Attorney,
Mahoning County Court House,
Youngstown, Ohio,
Attorney for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 564

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

PETITION FOR REHEARING

Now comes the appellant, pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States and petitions for a rehearing of his case.

THEODORE R. SAKER,
Attorney for Appellant.

IN SUPPORT OF THE PETITION

It is the position of the appellant that although he may not have correctly presented the grounds for his appeal in the previous pleadings addressed to this Court, his appeal is meritorious and ought to be considered further. It is appellant's belief that he has met all of the requirements necessary to vest in the Supreme Court of the United States the jurisdiction to review the decision of the Supreme Court of the State of Ohio.

The judgment rendered by the Supreme Court of the State of Ohio on September 23, 1964, denying rehearing

in the case of *Carmen Tisone* vs. *State of Ohio* was a final judgment of that court. The Supreme Court of the State of Ohio is the highest court in Ohio in which the cause of the appellant could be heard.

The question of the constitutional validity of the search of which the appellant complains was raised before trial in his trial in the Court of Common Pleas of Mahoning County, Ohio. (See "Jurisdictional Statement", page 3.) This question was preserved in the Court of Appeals and was considered by that court in its written opinion. (See "Jurisdictional Statement," page 11.) This question was again raised by the appellant before the Supreme Court of the State of Ohio and was considered by that court when it stated that: "On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein." (See "Jurisdictional Statement," page 14.)

Directly in point with the refusal of the Ohio Supreme Court to reverse the decision of the Court of Appeals, the appellant would respectfully point out that the Ohio Supreme Court has consistently differed with what the appellant believes to be the sense and essence of the decisions of the Supreme Court of the United States regarding the tests of the legality of searches and seizures. By this statement, the appellant does not wish to impute that the Ohio court has avoided or opposed the rulings of the Supreme Court of the United States, as those rulings declare the law of the land. Most certainly, the Ohio court has not. Rather, that court has limited the import of the landmark cases of *Mapp v. Ohio*, 367 U.S. 643 and *Ker v. California*, 374 U.S. 23, to the specific facts of those cases. The Ohio court has refused to elicit from the decisions of the Supreme Court of the United States the essential elements of

an illegal search and seizure, and, in the opinion of the appellant, has applied the rules expressed so woodenly and mechanically that injustice results to those who embody the essence, but not the letter of the ruling of the Supreme Court of the United States. On some occasions, outside the walls of the chambers in Columbus, Ohio, some of the members of the Ohio court have expressed their personal dissatisfaction with the rulings of the Supreme Court of the United States as those decisions must apply to other situations where the claim of an illegal search has been made. In this respect, the attention of the Court is respectfully directed to an article appearing in 50 *American Bar Association Journal*, pp. 815-818, entitled, "Protecting the Public from *Mapp v. Ohio* without Amending the Constitution." written by the Honorable Kingsley A. Taft, Chief Justice of the Supreme Court of the State of Ohio.

Admittedly, the case of the appellant does not fall clearly within the aggravated facts of *Ker* or *Mapp*, so the appellant is requesting the permission of this Court to demonstrate, through brief and argument, that his Constitutional rights have been violated as flagrantly as were those of Miss Mapp and Mr. Ker.

The appellant has shown that the Court of Appeals has either misread or failed to read the decisions of the Supreme Court of the United States; that the police officials and magisterial judges failed to follow the procedures prescribed by the laws of Ohio and, in so doing, violated the appellant's federally-guaranteed rights; and that continuing problems surround the question of Constitutional searches and seizures which cannot be solved by a reading of the law by those judges who do not recognize the inherent guarantee, but only the particular application of that guarantee directly in point with cases already decided.

The appellant has suffered a great injustice at the hands of the final Ohio judges of his cause. He now makes this last appeal that his application may be reheard.

THEODORE R. SAKER,
50 East Broad Street,
Columbus, Ohio,
/S/ AVETIS G. DARVANAN,
802 Mahoning Bank Building,
Youngstown, Ohio,
Counsel for Appellant.

AFFIDAVIT

Now comes Theodore R. Saker, Attorney for the herein Appellant, and says that the foregoing Petition for Rehearing has been submitted in good faith and not for delay.

Further the affiant sayeth not.

THEODORE R. SAKER.

STATE OF OHIO, COUNTY OF FRANKLIN, ss:

Sworn to before me and signed in my presence this 3rd day of February, 1965.

JEAN E. HOFFMAN,
Notary Public.

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